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Cl lodge

Single Bench

(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No. 4334 of 2004

PETITIONER:

P.R. No. 43621/04
Presented by Shri Sanjeev Gupta
dated 9/11/04

Dr. Rajesh Pathak,
S/o Late Shri Shatrughna Dutt Pathak, Aged about 60 years, Principal, Engineering College, Raipur, (holding additional charge of Additional Director, Technical Education, Chhattisgarh), R/o # 1, Recreation Road, Choubey Colony, Raipur, Chhattisgarh.

- Versus -

RESPONDENTS:

1. State Govt. of Chhattisgarh, Through: Secretary, Department of Technical Education, D.K.S. Bhawan, Raipur, Chhattisgarh.

2. Dr. D.S. Bal, Professor (Mechanical Engineering), In-charge Principal, Engineering College, Jagdalpur, District: Bastar, Chhattisgarh.

9/11/04

3. Dr. R.P. Sukhija, Professor (Applied Mechanism), Engineering College, Raipur, Chhattisgarh.

WRIT PETITION UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN THE NATURE OF MANDAMUS, CERTIORARI AND/OR ANY OTHER SUITABLE WRIT OF LIKE NATURE

(MD)

HIGH COURT OF CHHATTISGARH, BILASPUR

Single Bench:- Hon'ble Shri Justice Dhirendra Mishra

Writ Petition No.4334 of 2004

Petitioner :- Dr.Rajesh Pathak

Vs

Respondents :- State of Chhattisgarh and Others.

Petitioner by Shri Sanjay K.Agrawal, Advocate.
State/respondent No.1 by Shri Satish Gupta, Dy.G.A.
Respondent No. 2 by Shri Utkarsh Verma, Advocate.

JUDGEMENT
(Delivered on 15 /03/2005)

Heard on I.A.No. 1640/2005, being an application for bringing amendment in return on record.

The application I.A.No. 1640/2005 is allowed. Respondents to carry out amendment in the return.

Also heard the petition finally.

The petitioner was posted as Principal, Engineering College Raipur with the charge of Additional Director (Technical Education),Directorate, Raipur with Drawing and Disbursing power. The respondent/State vide order dated 28.10.2004 of Annexure P/11, transferred and posted the petitioner as Additional Director, Technical Education (Project Cell), Directorate, Raipur. By this order, respondent No.2 has been posted as Additional Director (full fledged), Directorate of Technical Education, Raipur and respondent No.3 has been posted as In-charge Principal, Engineering College, Raipur. By the instant petition the petitioner has challenged the above transfer order on the ground of malafide and violation of statutory rules.

The case of the petitioner is that he was earlier appointed as professor and confirmed by the Public Service Commission in the year 1992 and vide order of 13.11.2001 of Annexure P/5, he was given the additional charge of Additional

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Director after reorganization of the State of Chhattisgarh.The petitioner is the only person who is working in the cadre of Principal and he has been declared as the Head Of The Department by the State Government vide order of Annexure P/7 in the month of January 2001.The seniority list was published on 1st April 2004 by the State Government wherein the petitioner is the only person who is holding the substantive post of Principal and as per rule 7 of M.P.Shaikshanik Seva (Takniki Shakha Bharti)Niyam, 1967(hereinafter referred to as 'Rules of 1967'), the post of Director (Technical Education) which includes the Additional Director also, is to be 100% filled up from the cadre of Principals working in Government Engineering College, by way of transfer.The State Government has created one post of Director and three posts of Additional Director and the posts of Director and Additional Director are of equal rank having the same pay-scale and accordingly, the posts are to be filled up from the cadre of Principal of the Government Engineering College by way of transfer in accordance with rule 7 of Rules 1967.

The above Rules of 1967 have been framed by the State Government exercising powers conferred under Article 309 of the Constitution of India and the order of Annexure P/11 has been passed in violation of the above Rules inasmuch as that the respondent No.2 who has not even been promoted to the substantive post of Principal, has been posted by the impugned order as Additional Director (full fledged) vide order of Annexure P/11. After reorganization of the State of Chhattisgarh, the State has received one post of Additional Director from the undivided State of Madhya Pradesh and the petitioner was given the additional charge of the post of Additional Director and he was also declared as Head of the Department with Drawing and Disbursing powers under the M.P. Book of Financial Powers, 1995, and since then, he was discharging the duties and functions of the Head of the Department (Directorate of Technical Education). However, subsequently on 05.10.2002,one post of Director and three posts of Additional Directors became available and the said posts were sanctioned by the State of Chhattisgarh to set up the Directorate of Technical Education. However, instead of posting the petitioner as Director after availability of the post of Director, the petitioner was transferred and posted under respondent No.2 who is not even promoted to the post of professor and has never been promoted to the post of Principal which is a condition precedent for appointment of Director or Additional Director. In the seniority list of Annexure P/6 circulated by the respondent/State, the name of the petitioner finds place at Serial No.1 where he is shown as Principal in the Government Engineering

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College, Raipur whereas the name of respondent No.2 finds place at Item No. 19 as Reader of Mechanical Engineering Department wherein the name of respondent No.2 is at Serial No.3 in the above list.

The respondent No.2 was promoted to the post of professor from the post of Reader vide document of Annexure R-2/A under Career Advancement Scheme and as such respondent No.2 has not been promoted to the substantive post of professor as per recommendation of Departmental Promotion Committee and therefore, he was not eligible to be posted as Additional Director (full fledged). It is further submitted by the petitioner that the post of Principal of Government Engineering College is promotional post and the professors who have minimum five years experience of professor, are only eligible to be promoted to the post of Principal and only the Principal could be considered to be posted as Director or Additional Director of Technical Education and as such appointment of respondent No.2 on the post of Additional Director is in breach of the Rules of 1967 as he does not belong to the cadre of Principal and thus his name could not be considered to be posted as Additional Director and in any case, could not have been posted above the petitioner who is undisputedly senior to respondent No.2. Thus, the order of Annexure P/11 is in violation of Rules 1967 and the same has been passed malafidely.

The respondent No.1, on the other hand, in his return has not disputed the factual aspect of seniority of the petitioner as claimed in the petition. However, it is submitted that respondent No.2 was awarded promotion to the post of professor under the Career Advancement Scheme vide order dated 10.08.2004 with effect from 01.01.1996 and as such he was eligible to be considered for the substantive post of Principal as he is fulfilling the minimum qualification of five years teaching experience and thus, respondent No.2 could be appointed to the post of Additional Director (Technical Education). He submits that the order dated 28.10.2004 has been passed by the respondents under administrative exigency.

The respondent No.2 in the return has submitted that there are one post of Director and three posts of Additional Director in the Department of Technical Education and all the posts are of equal category and thus, the seniority of the petitioner is not affected in any way by the impugned order and the prayer of the petitioner for quashing of the impugned order is not maintainable. It is further submitted that the petitioner's name can be considered for the post of Director as

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he is the senior Additional Director but challenge to posting of respondent No.2 as Additional Director is without any foundation.

Learned counsel for the petitioner submits that the impugned order of transfer has been passed malafidely and in a utter violation of the Rules 1967 because by the impugned order, respondent No.2 has been posted as Additional Director (full fledged), Technical Education in violation of rule 7 of Rules 1967 where it is provided that the post of Director/ Additional Director of Technical Education is to be filled in from the cadre of Principal by way of transfer. As respondent No. 2 was not even duly promoted to Principal as per recommendation of the D.P.C. and he is holding the substantive post of Reader only, which is evident from the seniority list on Annexure P/8, he could not have been posted as Additional Director (full fledged). The impugned order has been malafidely passed just to favour and accommodate respondent No.2 which is evident from the fact that though the petitioner was discharging the duties of Additional Director (Technical Education) and was also designated as the Head of the Department with Drawing and Disbursing power and he was the only person who was posted to the ex-cadre post of Principal which is a condition precedent for selection to the post of Director as per rule 7 of Rules 1967. However, by the impugned order, the petitioner has been posted as Additional Director (Project Cell) under respondent No.2. Respondent No.2 has himself admitted in para-4 of his return that he was holding the substantive post of professor at the time of passing of the impugned order.

However, it is contended by the respondents that the petitioner as well as respondent No.2 have been posted on the equal rank as Additional Director and therefore, the grievance of the petitioner that he is made to work under respondent No.2 has no force as the impugned order nowhere mentions that the petitioner is to work under respondent No.2 and the pay-scale and status of the Additional Director posted by the impugned order is of the same post and thus, there is no ground to the petitioner to challenge the impugned order.

The order of Annexure P/11 is an order of transfer. The parameter to challenge the order of transfer is limited as pointed out by counsel for the petitioner. Learned counsel for the petitioner places reliance in paragraph of 7 and 10 of the judgment reported in ***(1993) 4 SCC, 357*** in the matter of ***Union of India and others Vs. S.L.Abbas.*** The relevant paragraphs 7 and 10 are being reproduced hereunder;

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"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

"10. The said observations in fact tend to negative the respondent's contentions instead of supporting them. The judgment also does not support the respondents' contention that if such an order is questioned in a court or the tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the court or the tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterized as mala fide for that reason. To reiterate, the order of transfer can be questioned in a court or tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions.

Learned counsel for the petitioner also relies upon the judgement reported in ***(2004) 4 Supreme Court Cases 245*** (para 9 & 12) in the matter of ***Union of India and others Vs. Janardhan Debanath and another*** wherein it has been held that unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerened.

Further relying upon the matter of ***State of U.P. and Ors. Vs. Goberdhen Lal*** reported in ***Judgment Today, 2004 (5) SC 454*** where in paragraph-7 it has been held that unless an order of transfer is shown to bean outcome of a mala fide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made.

Learned counsel for the petitioner submits that the impugned order is bad on the following grounds;

(i) that the same has been passed in violation of Rules 1967 which categorically provides that a person cannot be posted to the post of Additional

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Director unless he occupies a substantive post of Principal and from the pleadings of the respective parties, it is evident that respondent No.2 has at the most occupying the post of professor and at no point of time, he has been promoted to the post of Principal which is a promotional post from the post of professors.

(ii) that the petitioner was occupying the post of Additional Director (Technical Education) with status of Head of the Department and withdrawing and disbursing powers conferred, and now the petitioner has been made Additional Director (Project Cell) whereas respondent No.2 who is not eligible to be posted to the post of Additional Director has been designated to Additional Director (full fledged) with the status of Head of the Department, Withdrawing and Disbursing powers.

(iii) that the petitioner is made to work under his junior also smacks malafidely on the part of the respondents.

Thus, on the above grounds of violation of statutory rules and further on the ground of malafide and arbitrariness, the impugned order deserves to be set aside.

On the other hand, learned counsel for respondents No.1 and 2 submits that the above order has been passed under the administrative exigencies and the petitioner as also respondent No.2 have been posted to the post of Additional Director and there is no discrimination and it is wrong to say that the petitioner has been made to work under respondent No.2 who is junior as both the posts are of equal status, having same pay-scale and therefore, it is not correct that the petitioner has been discriminated.

It is further submitted by learned counsel for the respondents that respondent No.2 has been promoted to the post of professor, w.e.f.01.01.1996, and as completed five years as professor and was eligible to be posted to the post of Principal and therefore, the contention of the petitioner that he was not eligible to be posted to the post of Additional Director, is without any substance.

Learned counsel for respondent No.2 submits that he is not disputing the seniority of the petitioner. However, instead of making a prayer that he should be designated as Director, the petitioner's grievance is against respondent No.2 and the petitioner is not able to demonstrate as to what prejudice has been caused to

him by designation of respondent No.2 as Additional Director. It is further submitted that the petitioner is placing on record the order dated 17.11.2004 wherein respondent No.2 was made Head of the Department but the petitioner by the instant petition has not challenged this order and therefore, it is not open to the petitioner to seek relief against the order which is not challenged by him. In support of his contention, he placed his reliance on the judgement reported in ***AIR 1977 Supreme Court 876*** in the matter of ***D.Nagaraj etc. Vs. State of Karnataka and others etc*** where in paragraph-7, it is stated that a person who is not aggrieved by the discrimination complained of cannot maintain a writ petition.

I have heard learned counsel for the respective parties.

During the course of the argument, learned counsel for respondent Nos. 1 & 2 have admitted that petitioner is senior to respondent No.2.

On the last date of hearing i.e.07.03.2005, when it was pointed out by this Court that the petitioner has made categorical submission in paragraph-6 of the petition that he is made to work under respondent No.2 who is junior to him, it was submitted on behalf of the respondent / State that he shall seek instructions from the State regarding position of the petitioner vis-à-vis that of respondent No.2 as per transfer order of Annexure P/11. However, when on 11.03.2005, the matter was taken up, learned counsel for the respondent was not able to clarify the position and on the other hand, learned counsel for the petitioner stated that in the meanwhile, an order dated 17.11.2004 has been passed by the State and by which respondent No.2 has been designated as Head of the Department with Drawing & Disbursing powers and copy of the said order was shown which is not disputed by counsel for the State/respondents.

The only question requires for examination is whether the order of Annexure P/11 being a transfer order can be interfered with in the light of the binding judgments referred by learned counsel for the petitioner. As it has already been established in the foregoing paragraphs that it is not disputed that the petitioner is the only person who is occupying the substantive post of Principal in the State of Chhattisgarh and he was posted to the post of Additional Director after reorganization of the State of Chhattisgarh, the petitioner was given additional charge of Additional Director (Technical Education) and subsequently

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he was also designated as Head of the Department of the Directorate of Technical Education with Drawing and Disbursing Powers.

It is also not disputed by the parties that respondent No.2 has been promoted to the post of professor under the Career Advancement Scheme vide order dated 22.01.2004 w.e.f. 01.01.1996 and is presently occupying the substantive post of professor. Secondly, it is not the case of respondent No.2 or respondent No.1 that respondent No.2 was promoted to the post of Principal and thirdly that in the seniority list as on 01.04.2004, the name of the petitioner is shown at serial No.1 against the post of Principal in the Government Engineering College whereas the name of respondent No.2 finds place at Item No. 19 as Reader of Mechanical Engineering Department wherein the name of respondent No.2 is at Serial No.3 in the seniority list.

Thus, the contention of the petitioner that respondent No.2 who is not even occupying the substantive post of Principal which is a condition precedent for appointment to the post of Additional Director has been posted as Additional Registrar (full fledged) in violation of the Rules 1967, is established.

In view of the admitted factual position, the propriety of the order of Annexure P/11 is to be examined. The respondent No.2 has not only been designated as Additional Director of Technical Education (full fledged) but also been designated as Head of the Department vide order 17.11.2004 which is not disputed by the respondents. The Rules of 1967 referred by the petitioner as Annexure P/10 categorically provide that 100% posting of the Directors are to be made from the cadre of Principals by way of transfer. The respondents could not justify as to how respondent No.2 who was not occupying the substantive post of Principal/Professor, could be designated as Additional Director, Technical Education (full fledged), though he did not fulfill the criteria under the Rules applicable to his category.

Under these circumstances, the order of Annexure P/11 is admittedly in violation of the statutory Rules1967 and in the light of the fact that the petitioner was eligible in all respect to be designated to the post of Additional Director and further that the petitioner was already occupying the substantive post of Additional Director with Head of the Department status, by the impugned order he has been made to work under respondent No.2 who has been subsequently designated Head of the Department is arbitrary, unreasonable and malafide.

Therefore, under these circumstances, placing reliance upon the judgment quoted above, I am of the opinion that the impugned order has to be quashed on the ground of the same being in violation of the statutory Rules and arbitrary. Accordingly, the petition is allowed and the order of Annexure P/11 dated 28.10.2004 so far as it relates to the petitioner and respondent Nos. 2 and 3, is quashed.

Sd/-
Dhirendra Mishra
Judge